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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 620

UNITED STATES OF AMERICA, *Petitioner,*

v.

THOMAS L. SUTER

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statutes Involved	2
Statement	2
Argument	10
1. The Decision Below Does Not Present Any Issue of General Importance	11
2. The Decision Below Is Right	14
3. The Action of the Court Below Is Consonant with the Intent of Congress	16
4. The Statute of Limitations Is Not in Issue	23
Conclusion	25
Appendix I	26

CITATIONS

CASES:

Captain Tyler's Case, 15 C. Cls. 223	12
Cloud v. *United States*, 43 C. Cls. 69	12
Degge v. *Hitchcock*, 229 U. S. 162	11
Dismuke v. *United States*, 297 U. S. 167	11, 15
Frame v. *United States*, 124 C. Cls. 557, *cert. den.* 345 U. S. 994 (1953)	24
Lemly v. *United States*, 109 C. Cls. 760	13
Lloyd Sabaudo Societa Anonima v. *Elting*, 287 U. S. 329	11
McLean v. *United States*, 226 U. S. 378	11
Meadows v. *United States*, 281 U. S. 271	11
Medbury v. *United States*, 173 U. S. 497	11
Ness v. *Fisher*, 223 U. S. 683	11
Pocono Pines Hotel Co. v. *United States*, 73 C. Cls. 447	13
Prince v. *United States*, 127 C. Cls. 612	12
Register v. *United States*, 131 C. Cls. 98	12

Page

Silberschein v. *United States*, 266 U.S. 221 11
Suter v. *United States*, 153 F. Supp. 367 1
Uhley v. *United States*, 128 C. Cls. 608 13
United States v. *Atchison T. and S. F. R. Co.*, 249 U. S. 451 11
United States v. *Hvoslef*, 237 U. S. 1 11
United States v. *Laughlin*, 249 U. S. 440 11
United States ex rel. Louisville Cement Co. v. *Interstate Commerce Commission*, 246 U. S. 638 24
United States ex rel. Parish v. *MacVeagh*, 214 U. S. 124 11
United States v. *Toma*, 148 F. Supp. 489 13
United States v. *Williams*, 278 U. S. 255 11
Updike v. *United States*, 132 C. Cls. 627 8
Vaughn v. *United States*, 147 F. Supp. 280 12
Virginia Railway Co. v. *System Federation No. 40*, 300 U. S. 515 11
Williamsport Wire Rope Co. v. *United States*, 277 U. S. 551 11
Womer v. *United States*, 114 C. Cls. 415 24

STATUTES:

Act of April 30, 1790, First Congress, 2d Session, Ch. 10, 1790 11
Act of April 3, 1861, 12 Stat. 289 11
Act of April 3, 1939, 53 Stat. 557 .....8, 26
Act of October 25, 1951, 65 Stat. 655 .....16, 17, 18, 23, 27, 28
Career Compensation Act of 1949, 63 Stat. 802 8, 17, 18, 23, 27
Legislative Reorganization Act of 1946, 60 Stat. 837 16
Public Law 1028, 84th Cong., 2d Session, Section 1552 .....13, 23
Rule 23(1)(c), Supreme Court Rules 2
5 U.S.C. 191a 13, 27
28 U.S.C. 1255(1) 1
28 U.S.C. 1491 .....13, 15, 25, 26
28 U.S.C. 2501 .....2, 23, 24

OTHER AUTHORITIES:

27 Comp. Gen. 665 17
30 Comp. Gen. 409 8
36 Comp. Gen. 210 8

Page

Hearings before a Sub-Committee of the House Committee on Armed Services on H. R. 1181, 82nd Cong., 1st Sess. 17, 18, 19, 20, 21, 22
H. Rep. No. 449, 82d Cong., 1st Sess., (1951) 6 .... 17, 22
Report of Investigation of Physical Disability Retirement of Officers of the Army, Navy and Marine Corps 21
S. Rep. No. 788, 82d Cong., 1st Sess., (1951) 2 22
S. Rep. No. 923, 82d Cong., 1st Sess., (1951) 2 22
97 Cong. Rec. 7588-89 22
97 Cong. Rec. 12964-66 23

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OPINION BELOW

The opinion of the Court of Claims (Appendix A to Petition (21), is reported at 153 F. Supp. 367.

JURISDICTION

Petitioner invokes the Court's jurisdiction under 28 U.S.C. 1255(1).

QUESTION PRESENTED

The respondent, a former Reserve officer who became unfit for military service by reason of physical disability, was released to inactive duty in 1946 to

be re-examined within six months to determine whether his admitted disability was permanent. In 1951, after several unsuccessful attempts to secure such a determination, he was, under an interpretation of the law now admitted to be erroneous, denied the right to appear before a Physical Evaluation Board. In 1953, respondent applied to the Air Force Board for Correction of Military Records to establish his entitlement to disability retirement and retirement pay. He was arbitrarily refused a hearing. The sole question presented, therefore, is whether by virtue of either the unlawful denial in 1951 of the respondent's right to appear before a Physical Evaluation Board or the arbitrary refusal in 1954 to grant him a hearing before the Correction Board on his application for correction of his military record to reflect the established fact of his right to disability retirement pay since 1946, the Court of Claims had jurisdiction to consider and render judgment on respondent's claim for such pay.[1]

STATUTES INVOLVED

The pertinent statutes are set forth in Appendix I.

STATEMENT

The respondent, Major Suter, entered the Army as an enlisted man in 1920. He was discharged in 1921 and commissioned in the Officers' Reserve Corps

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[1] The petitioner has misstated the questions presented (Petition 2). By ignoring the requirement of Rule 23(1)(c) that the questions be "expressed in the terms and circumstances of the case", the petitioner has created the appearance here of an issue concerning jurisdiction which is at material variance with that actually presented, and one concerning accrual of a cause of action within the meaning of the statute of limitations, 28 U.S.C. 2501, which is not presented at all.

in 1923. He served on active duty during several brief periods until May 11, 1942, when he volunteered for extended active duty during World War II. Petition, App. A26.

At the time respondent entered upon active duty in 1942, he was in good health. Petition, App. A26. His hearing initially was injured in a bombing attack by the enemy at Algiers, Africa, January, 1943. *Ibid.* In December of 1943, respondent, while at Bari, Italy, in connection with an aircraft ferrying mission, was once more subjected to an enemy bombing attack and his hearing again seriously affected. Petition, App. A27. On November 28, 1945, respondent was admitted to Walter Reed General Hospital, Washington, D. C. Petition, App. A29. On February 26, 1946, he met a Disposition Board at that hospital which found him to have become incapacitated for military duty October 8, 1945; that the approximate date of origin of his incapacity was January 1943; that his disability was incident to his service; was total and permanent; and that he was unfit for service. Petition, App. A30. The Disposition Board recommended that respondent be ordered to appear before an Army Retiring Board. Petition, App. A31.

Respondent appeared before an Army Retiring Board at Walter Reed General Hospital on March 22, 1946. Petition, App. A31. The Board, having considered the evidence and heard the testimony of the medical witnesses, reached the following findings (Petition, App. A31-32):

> "The Board is unable at this time to determine the permanency of Major Suter's incapacity, and the Board recommends 6 months' temporary limited service, with re-examination and revaluation

at the end of that time, at a hospital specializing in deafness."

There is no evidence in the record that the action of the Army Retiring Board was approved by the Commanding General, Army Air Force, the Surgeon General, The Adjutant General, or the Secretary of War. Petition, App. A32. The only evidence in the Retiring Board record bearing on the permanency of the respondent's disability was the testimony of the medical witnesses in plain, unequivocal terms that respondent's deafness was permanent. Petition, App. A31-32.

Walter Reed General Hospital records show that respondent was placed on limited duty March 25, 1946. Petition, App. A32. By Special Orders No. 82, March 23, 1946, respondent was released from further observation and treatment at Walter Reed and transferred to the Separation Center at Fort Meade, Maryland. *Ibid.* On March 26, 1946, by Paragraph 115, Special Orders No. 85, Third Service Command, Fort Meade, respondent was relieved from active duty, not for physical disability, effective June 9, 1946. Petition, App. A26, 32.

On December 20, 1946, respondent reported to and was admitted to a United States Army Hospital in Frankfurt, Germany for the purpose of undergoing a final type physical examination. Petition, App. A33. Although respondent requested that the report of such examination be forwarded to Walter Reed General Hospital, there is no existing record of the results of the said examination. *Ibid.*

In January, 1948, respondent returned to the United States and sought admission to Walter Reed General

Hospital where he was admitted and examined. Petition, App. A33. He was released some time in March, 1948. Petition, App. A34. On April 15, 1948, respondent filed his application for compensation with the Veterans Administration in Paris. Petition, App. A34. Subsequently, respondent was informed by the Veterans Administration, on March 17, 1949, that his disabilities had been determined to be service-connected and disabling to a combined degree of 50 per cent from the date of his claim, April 15, 1948.

In May of 1949, respondent returned to the United States and again attempted to enter Walter Reed. He was directed to the Air Force, which department, by letter dated May 16, 1949, subject: "Authorization for Hospitalization," notified respondent as follows (Petition, App. A34-35):

> "1. Reference is made to your recent request for appearance before an Air Force Retiring Board to determine your eligibility for retirement pay benefits.
>
> "2. In view of the circumstances in your case, it has been determined that you should be given an opportunity to enter Walter Reed General Hospital, Washington, D. C. for physical evaluation, and appearance before a retiring board, if warranted.
>
> "3. You are authorized to report by wire or letter to the Commanding General, Walter Reed General Hospital, within ten days from the date of receipt of this letter, for the purpose of making the necessary arrangements for admittance to that hospital. Action has been initiated to furnish the hospital with all pertinent medical records on file in this Headquarters. Inasmuch as the hospital commander will not grant you admittance to the hospital until such time as the

pertinent records have been assembled, it is suggested that you advise him at an early date of the location of all previous hospitalizations in Army hospitals, if any, so as to facilitate the procurement of all clinical and other medical records.

"4. This authorization will be at no expense to the Government, in which case you will not be reimbursed for travel or any other expenses incurred. There will be a subsistence charge during hospitalization, which at most installations does not exceed $1.40 per day.

"5. In the event you do not desire to avail yourself of this authorization, you should promptly notify this Headquarters, USAF, Director of Military Personnel, Attention: Promotions and Separations Division, Washington 25, D. C.

"By Order of the Secretary of the Air Force:"

On May 26, 1949, respondent replied to the above letter from his home at Hillsboro, Virginia, as follows (Petition, App. A35):

"Subject: Authorization for Hospitalization.

"To: Commanding General, Walter Reed General Hospital.

"1. As directed in the 3rd paragraph of the letter dated 16 May, 1949 from the Department of the Air Force, I am reporting myself available to enter Walter Reed General Hospital for a physical examination, evaluation and reappearance before an Air Force Retirement Board, as directed by the findings of an Army Retiring Board dated 22 March, 1946.

"2. The hospitalization and the discovery of a physical disability for which I was ordered before an Army Retirement Board was entirely at the Walter Reed General Hospital. The sole exception was the hospitalization I received at the

7th Station Hospital, Oran French North Africa for a dislocation of my left knee with the resulting complications and treatment in an Infirmary, Barie, [sic] Italy, for concussion due to enemy bombardment.

"3. I am awaiting your pleasure and will be available until 30 June 1949 to comply with the directions contained in the letter of 16 May, 1949."

No order to the hospital being forthcoming, respondent, in the early fall of 1949, returned to Europe. Petition, App. A35. In 1951, in France, respondent received a letter dated April 23, 1951 from Walter Reed General Hospital, forwarded to him from a Washington, D. C. address. The hospital authorities wrote (Petition, App. A36):

"SUBJECT: Authorization for Hospitalization

"To: Major Thomas L. Suter
27 H Street, N. W.
Washington, D. C.

"1. Arrangements have been made for your admittance to the hospital for observation and necessary treatment, including appearance before a medical board and, if warranted, a Physical Evaluation Board. Your records are now in this office.

"2. Kindly notify this office at least 72 hours prior to the date of your admission.

"FOR THE COMMANDING GENERAL:"

Respondent returned to the United States and, on June 28, 1951, reported to Walter Reed in compliance with the above instructions. Upon arrival he was informed that the law then in effect would not

permit consideration of his application for retirement for physical disability.[2] Petition, App. A36.

In 1953, respondent applied to the Air Force Board for Correction of Military Records for a correction of his record to show his retirement for physical disability as of June 9, 1946. On or about December 11, 1953, the Surgeon General, United States Air Force, addressed the following opinion to the said Air Force Correction Board (Petition, App. A36-37):

> "1. At the time Major Suter was relieved from Active Duty he met a retiring board. The records of this Board show that it was cognizant of and evaluated all of the defects which are subsequently shown to have been present. The patient's complaints were numerous, and referable to:
>
> "a. Deafness.
>
> "b. Residuals of injury (bruise) to left shoulder.
>
> "c. Injury to left knee, not taken up by the Board, subsequently rated zero *prcent* [sic] by the Veterans Administration.
>
> "2. The Board was unable to reach a conclusion and recommended further trial at duty and

[2] Respondent was informed that this action was taken in compliance with the Comptroller General's opinion of April 25, 1951, 30 Comp. Gen. 409, which opinion held, in effect, that Section 5 of the Act of April 3, 1939, 53 Stat. 557, authorizing retirement pay benefits on account of physical disability to members and former members of the Army of the United States, had been wholly superseded as of October 1, 1949, by the provisions of Title IV of the Career Compensation Act of 1949, 63 Stat. 802, 816. It has been settled that this view of the law was erroneous. *Updike* v. *United States*, 132 C. Cls. 627 (1955). The Comptroller General has now abandoned it. 36 Comp. Gen. 210 (September 14, 1956).

a re-evaluation. Since this re-evaluation was subsequently provided, but was incomplete because of Major Suter's other personal requirements, we are forced to utilize other evidence to determine whether, at the time of separation, Suter was or was not 'permanently incapacitated for further military service'.

"3. Major Suter's statements show that subsequent to separation he made at least four transatlantic voyages and earned his living in Algiers and Paris. Based upon this it is presumed that he could have performed effective duty during this period, including overseas duty. The wearing of a hearing aid does not warrant a finding of unfitness for duty; on the contrary it rehabilitates the person for such service.

"4. Therefore it is the opinion of the Surgeon General that Major Suter was not permanently physically incapacitated for military duty at the time he was separated. There is no error found in the separation processing. It is recommended that no change be made in the military records for medical reasons."

On January 28, 1954, the Secretary of the Air Force Board for Correction of Military Records informed respondent by letter that a careful consideration of his military record failed to establish a sufficient basis for a hearing of his case and that, therefore, no further action on his application was contemplated. Petition, App. A37.

On June 29, 1954, respondent filed his petition to the Court of Claims. On July 12, 1957, the Court held that, in view of the refusal of a hearing in 1951 due to a mistake of law, and the arbitrary refusal of a hearing in 1954 because of a recommendation of the Surgeon General based upon an unfair and in-

accurate recital of the facts, respondent was entitled to relief. The Court held that respondent, when he was released from the Army in 1946, had a total and permanent service-connected disability. If the Physical Evaluation Board in 1951, or the Board for the Correction of Military Records in 1954, had so decided and the decision had been officially approved, the respondent would have received his retired pay from the date of his release in 1946. Since respondent's cause of action was based upon the failure of the first tribunal to decide his case at all, and, in the alternative, upon the failure of the second to decide the case upon the evidence, the Court resolved the question as the prior tribunals should have, and with like effect. Petition, App. A25.

Judgment was entered in favor of respondent for retired pay from the date of his release to inactive duty in 1946, less credit for payments which he had received from the Veterans Administration prior to the date of judgment. *Ibid.*

ARGUMENT

The decision below is not of sufficient importance to warrant exercise of the Court's jurisdiction. Even accepting, *arguendo*, petitioner's view of the issues presented, the decision applies to a mere handful of members of the military services. Those affected, stated broadly, are officers who, having served on active duty with the armed forces and having become physically disabled in line of such duty, are released to inactive duty without the retirement pay provided by law. How narrow the decision really is will be shown hereinafter.

If, however, the decision which the Court is asked to review should be deemed to be of importance, it

is nevertheless right. It reflects the expressed intent of Congress in legislation over the span of a century, and more.[3] (See Section 3, *infra.*) Moreover, it is in consonance with the doctrine, many times reiterated by this Court, that the arbitrary, capricious and unlawful acts of administrative officers are subject to judicial review. *Dismuke* v. *United States,* 297 U. S. 167 (1936); *Virginia Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 562 (1937); *Lloyd Sabaudo Societa Anonima* v. *Elting,* 287 U. S. 329, 330, 331 (1932); *Meadows* v. *United States,* 281 U. S. 271, 274 (1930); *United States* v. *Williams,* 278 U. S. 255, 257, 258 (1929); *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551 (1928); *Silberschein* v. *United States,* 266 U. S. 221, 225 (1924); *United States* v. *Atchison, T. & S. F. R. Co.,* 249 U. S. 451, 454 (1919); *United States* v. *Laughlin,* 249 U. S. 440, 443 (1919); *United States* v. *Hvoslef,* 237 U. S. 1 (1915); *Degge* v. *Hitchcock,* 229 U. S. 162, 171 (1913); *McLean* v. *United States,* 226 U. S. 378 (1912); *Ness* v. *Fisher,* 223 U. S. 683 (1912); *United States ex rel. Parish* v. *MacVeagh,* 214 U. S. 124 (1909); *Bates & G. Co.* v. *Payne,* 194 U. S. 106, 109, 110 (1904); *Medbury* v. *United States,* 173 U. S. 497, 498 (1899).

1. The Decision Below Does Not Present Any Issue of General Importance.

The petitioner represents (Petition, 5) that the decision below rests upon and culminates a decade-long assumption of jurisdiction to determine whether mili-

[3] The first disability retirement system for officers was established in 1861. Act of April 3, 1861, 12 Stat. 289. However, the First Congress had provided for disability pay for all military personnel who might become unfit in line of duty. Act of April 30, 1790, First Congress, Second Session, Ch. 10, 1790.

tary personnel were or were not fit for active duty and whether they should or should not have been retired for physical disability. As a result, petitioner says, some 32 suits involving entitlement to disability retirement pay have been filed and are presently pending in the United States Court of Claims. Petition, 16 fn. This case, petitioner concludes, affords the Government its initial opportunity to question in this Court the erroneous assertion of jurisdiction below.[4] Petition, 8.

Accepting all that petitioner says in this respect at face value, the consequences of the numerous decisions below which petitioner here seeks to have corrected fall far short of raising an important Federal question. The filing of an infinitesimal number of suits of this general nature in the past 10 years from the more than sixteen million men and women who served for a time in the armed forces is so insignificant as to be beneath this Court's concern. In reality, however, the issues raised by this case are even more narrow than those suggested by petitioner, and its result is neither novel nor important.

The judgment below is primarily founded on a clear and conceded violation, in 1951, of respondent's statutory right to consideration of his entitlement to retire-

[4] Petitioner's statement concerning its initial opportunity is less than candid. See, *inter alia*, *Prince* v. *United States*, 127 C. Cls. 612 (1954); *Register* v. *United States*, 131 C. Cls. 98 (1955); *Vaughn* v. *United States*, 147 F. Supp. 280 (C. Cls. 1956). The Court of Claims has awarded judgments for retired pay due officers of the armed services for at least seventy-five years. *Captain Tyler's Case*, 15 C. Cls. 223 (1880). Judgments have been given for retirement pay due by reason of physical disability for nearly as long. *Cloud* v. *United States*, 43 C. Cls. 69 (1907).

ment for physical disability. The power of the Court of Claims to hear and render money judgments against the United States in this circumstance is nearly as old as the Court itself. See *Pocono Pines Hotel Co.* v. *United States,* 73 C. Cls. 447, 476-478 (1932). The right to disability retirement pay is founded on a law of Congress, and the Court of Claims has jurisdiction to hear and render judgment upon *any* claim against the United States founded on any Act of Congress. 28 U.S.C. Section 1491; *Lemly* v. *United States,* 109 C. Cls. 760 (1948).

The petitioner's suggestion that the holdings of the Court of Claims in *Lemly* and the case at bar disregard a mandate of Congress is devoid of substance. According to the petitioner, the Court of Claims began its novel assumption of jurisdiction in *Lemly* some 10 years ago. The petitioner might have added that in *Uhley* v. *United States,* 128 C. Cls. 608 (1954), a case closely analogous to one facet of respondent's, the court below held that a suit to recover disability retirement pay founded on arbitrary and capricious action of the Army Board for Correction of Military Records was within its jurisdiction. The significance of *Lemly* and *Uhley* is this: It must be assumed that Congress was aware of these decisions, since they are annotated directly under 28 U.S.C.A. Section 1491 and 5 U.S.C.A. Section 191a, respectively. *United States* v. *Toma,* 148 F. Supp. 489, 491 (U.S.D.C. Cal. 1957). Following *Lemly,* 28 U.S.C. Section 1491 was twice amended, and some two years after *Uhley,* 5 U.S.C. Section 191a was reenacted, without substantive change, as Section 1552, Public Law 1028, 84th Congress, 2d Session. The absence of the expression of any Congressional concern with the exercise by the

Court of Claims of jurisdiction over such claims founded on Acts of Congress is clear evidence, not of disregard of a Congressional mandate, but of strict adherence to the intent of Congress in this respect. See also Section 3, *infra*.

2. The Decision Below is Right.

At the time respondent was released from active duty without retirement pay, an Army Medical Board had found him to be permanently incapacitated for active duty, by reason of disabilities incurred on active duty, and in line of duty. Petition, App. A30. The Medical Board recommended that respondent be ordered before a Retiring Board. This was done and the Retiring Board, having heard the testimony and deliberated upon the evidence, announced as follows. Petition, App. A37:

> "The Board is unable at this time to determine the permanency of Major Suter's incapacity, and the Board recommends 6 months' temporary limited service, with re-examination and revaluation at the end of that time, at a hospital specializing in deafness."

It may be fairly inferred from the Retiring Board's language that it had found the respondent to be disabled but that it was not certain as to whether his disability was permanent. Thereafter, respondent was twice examined by Veterans Administration physicians. In 1948, he was found to be 50 per cent disabled and in 1952, 100 per cent disabled. Petition, App. A34, 37-38. What the Court below did, and all it did, referring only to the facts of record, was to examine the administrative treatment of respondent's case by the War Department after the fact of his

disability had been established, to determine whether such treatment had been fair, reasoned and lawful. Petition, App. A24, 25. The Court found that, in 1951, the Physical Evaluation Board had refused to hear respondent's case because of a mistake of law and that the Board for Correction of Military Records had made a similar refusal in 1954 based upon an unfair and inaccurate recital of the facts. *Ibid.*

The instant case, therefore, rather than being an attempt by the Court below to "interfere in military management," is no more than a careful and well reasoned example of the exercise of the Court's judicial duty to provide a remedy for unlawful or arbitrary and capricious acts of administrative officers. Such unlawful acts by an administrative officer have always been subject to judicial remedy under 28 U.S.C. 1491, and judicial power over the arbitrary or capricious use of the discretion conferred upon an administrative officer has been recognized for nearly as long. *Dismuke* v. *United States, supra,* and cases cited at page 11, *supra.*

In brief, the case at bar represents no improper extention by the Court of Claims of its lawful authority to "determine for itself the issue of disability and fitness for continued service." There was, and is no issue here as to respondent's disability, nor that it was incurred while he was on active service and entitled to the benefit of the statutes enacted by Congress for his protection. The sole questions put to and decided by the Court below were whether the denial by the petitioner of respondent's statutory right to an appearance before a Physical Evaluation Board[5] in

[5] Called a Retiring Board until October 1, 1949.

1951, and the refusal to grant him a hearing before a Correction Board in 1954, were arbitrary, capricious and unlawful.

3. The Action of the Court Below is Consonant with the Intent of Congress.

In 1953, having then been separated from active duty without pay for some seven years, respondent applied to the Air Force Board for Correction of Military Records for a correction of his record of service to reflect his right to retirement pay.[6] His application was arbitrarily and capriciously denied without a hearing. Petitioner argues that, "far from taking the creation of Boards for the Correction of Military Records as further proof of Congress' belief that the Courts have no function to perform in this area, the Court of Claims now asserts that this legislative action gave rise to jurisdiction to review,[7] and this despite the fact that Section 207 of the 1946 Act provides that corrections made under it shall be 'final and conclusive on all officers of the United States'." Petition, 13.

Petitioner's statement of the law and its interpretation are both incorrect. The quoted language does not appear in Section 207 of the 1946 Act. The Section as originally enacted contained no "finality" provision. When the Comptroller General in 1948 held that Section 207 did not authorize the payment of money to servicemen or ex-servicemen as a result of

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[6] The Boards had been created by the Legislative Reorganization Act of 1946, 60 Stat. 837, but did not acquire the right to grant monetary relief until passage of the 1951 amendment, 65 Stat. 655.

[7] See fn. 4.

Board action, Congress amended the Section to correct the situation created by the Comptroller General's decision.[8] The finality provision was added at this time, but under circumstances which made it abundantly clear that Congress was aiming at the Comptroller General, not the courts.

The 1951 amendment as originally introduced contained the statement that settlements pursuant to its provisions "shall be final and conclusive on all officers of the Government, including review by the courts of the United States, except when procured by means of fraud."[9] The major controversy over it appeared to arise upon the objection of the General Accounting Office that the proposed revision would interfere with that office's normal auditing responsibility. The dispute was settled by a compromise which distinguished between correction of military records, which were to be conclusive on the General Accounting Office, and payments based on such corrections, which were to remain subject to normal auditing procedures. However, on the subject of exclusion of judicial review, the members of the sub-committee launched a full scale attack directed at removing this aspect of the finality proviso.[10] They made clear their intent to provide judicial review to any applicant not satisfied with the Correction Board's decision, broad enough to cover mistake as well as fraud, and to afford servicemen and women a general appeal to the courts, including

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[8] 27 C. G. 665, 668 (1948).

[9] See H. Rep. No. 449, 82nd Cong., 1st Sess., 6 (1951).

[10] See Hearings before a sub-committee of the House Committee on Armed Services on H. R. 1181, 82nd Cong., 1st Sess., 369, 377, 391-93 (May 3-7, 1951).

a *de novo* review of all evidence before the Correction Board. As originally introduced, the amendment to Section 207 provided under sub-section (c) that any settlement made pursuant to sub-section (b) "shall constitute a complete release by the claimant . . . and such settlement shall be final and conclusive on all officers of the Government, including review by the Courts of the United States, except when procured by fraud."[11] When the sub-committee questioned a witness appearing for the General Accounting Office, the following passage occurred:[12]

> p. 377
>
> [Mr. Durham (Committee Member)] "When we passed the Reorganization Act did we not provide in that a provision whereby any individual under any regulation issued by any department of the executive branch of the Government would have the right of appeal to the courts?"
>
> Mr. Burns [GAO] "That is very likely there. I am not sure sir."
>
> . . . . . .
>
> Mr. Durham: "I was thinking of the fact we want to keep this review open by the Courts and all orders and regulations issued by the Government, so this would be something more or less in line with the act that we did pass."
>
> Mr. Burns: "Yes, in that respect, sir. Of course, there are really two different things here and it is well to keep that in mind. One thing is the determination, the correction of the record, and

[11] See Hearings before a sub-committee of the House Committee on Armed Services on H. R. 1181, 82nd Cong., 1st Sess., 353, 354.

[12] *Ibid.*, 377.

the other thing is the settlement based on that correction. Subsection (a) would give the head of the Department the authority to make the correction * * * We do not want to say it is not final and conclusive, with or without this language in subsection (c)."

The discussion between committee members and Mr. Baier, Department of Defense representative, is also most significant:[13]

Mr. Doyle. "Calling your attention to lines 10 and 11, subsection (c), it reads, 'including review by the courts of the United States'.

"Do you really think that the review by the courts should be eliminated except for cases of fraud? Aren't there cases of mistake?"

Mr. Baier. "I think this Board in a way is a court. I would like to say if this Board would turn down a case which would warrant merit, there are two alternatives, I think, for the individual. They can appeal to the Board and if the Board has additional evidence, in effect they have in the past had several cases where there have been appeals and the person went out and brought in more evidence and the Board gave them a satisfactory decision."

"In other cases, if this Board turns down a case, that person can come to Congress and ask for private relief bill. This is saving Congress private relief bills, but there is no action final against Congress and Congress has a right, and I am sure will, if they don't like what the Board did, to introduce a private bill and pass it."

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[13] See Hearings before a subcommittee of the House Committee on Armed Services on H. R. 1181, 82nd Cong., 1st Sess., 391, 392.

"Mr. Doyle. "I never like to see the right of the court to review any board abrogated, whatever the board is."

Mr. Baier. "I think that provision is to prevent a lot of these little cases from going to court and wasting the court's time where the Department has the record and they try to assemble the data."

Mr. Clemente. ". . . the courts are there for that specific reason. . . ."

Mr. Baier. ". . . it will save the court's time, not waste it, sir."

. . . . . .

p. 392

Mr. Doyle. "I may observe from a quarter of a century of a law practice before the court that fraud is pretty difficult to prove and when you say, except when procured by means of fraud, you are practically eliminating an applicant making a meritorious showing before a Federal court. If there is going to be any wording, I certainly favor the inclusion of "mistake" on a broader ground, so that at all times the applicants have the right, if they have the money, to go before a court and protect their rights.

"And the fact that you have reconsidered cases where there has been supplementary evidence in itself shows that there might well be many cases which might well go before the courts."

Mr. Clemente. "Well, if you had 16,000,000 people and only 15,000 claims, it would not throw much work on the courts all over the United States even if the whole of those 15,000 people appealed."

Mr. Baier. "I do not think there would be many appeals to the court."

Mr. Clemente. "Personally I think the services would be a lot better off if they allowed them to

> appeal to a court and you would then have a judicial determination. The services would not suffer by the fact that they were not arbitrary." [14]

In executive session, May 10, 1951, the sub-committee cut out the phrase "including review by the courts of the United States" for the stated purpose of ensuring "right of review by the courts." [15] It later was explained to the full committee that the phrase had been eliminated "so that under appropriate circumstances the courts of the United States might

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[14] There is additional legislative comment bearing on this point which is indicative of the attitude of Congress toward the situation in which respondent was placed. In 1948 the Legal Sub-Committee of the Committee on Armed Services, House of Representatives, 80th Congress, published its *Report of Investigation of Physical Disability Retirement of Officers of the Army, Navy and Marine Corps* (Government Printing Office, Washington, 1948, No. 261). The sub-committee reported as follows:

> "At the close of hostilities both the Army and Navy were confronted with the enormous task of evaluating the physical condition of many thousands of officers. The 99 Army Retirement Boards processed more than 80,000 individual cases. • • • In processing such a large number of cases it was inevitable that some mistakes would occur and both the Army and Navy admit that many mistakes did occur."

By petitioner's own computation (Pet., p. 16), there have been in the past ten years less than 100 cases filed with the Court of Claims. This represents the volume of litigation at the court below during the period when the tide of such cases flowing to the court from the situation under investigation by the Committee reached and passed its flood. If it was Congressional opinion that 15,000 such cases per year would not be too many, the actual number has been minuscule indeed.

[15] See Hearings before a sub-committee of the House Committee on Armed Services on H. R. 1181, 82nd Cong., 1st Sess. 401.

review these matters.[16] It also was included in the House Report that the phrase had been deleted because the Committee felt that "the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances."[17] There was very little debate on the floor of the House over the bill, but the Clerk did read the committee amendments including deletion of the words "including review by the courts of the United States."[18]

The published record of the Senate hearings does not contain any mention of judicial review, but they indicate that the Senate Sub-Committee considered the measure which passed the House rather than the original version of the bill.[19] It is apparent that the House Report was before the Senate Sub-Committee members, and both the Department of Defense and the General Accounting Office supported the measure which had passed the House. The Senate reports do not include any direct reference to judicial review, although it appears that the finality phrase was directed at limiting the General Accounting Office to its normal auditing function and rendering the findings of the correction boards "not subject to review by other government departments."[20]

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[16] See Hearings before a sub-committee of the House Committee on Armed Services on H.R. 1181, 82nd Cong., 1st Sess., 450.

[17] H. Rep. No. 449, 82nd Cong., 1st Sess., 3 (1951).

[18] 97 Cong. Rec. 7588-89 (1951).

[19] Hearings before a Sub-Committee of the Senate Committee on Armed Services on H.R. 1181, 82nd Cong., 1st Sess. (1951).

[20] S. Rep. No. 788, 82nd Cong., 1st Sess., p. 2 (1951); No. 923, 82nd Cong., 1st Sess., p. 2 (1951).

In brief, the Senate's position was that the finality proviso was designed only to protect successful applicants from reversal by the General Accounting Office of Correction Board decisions. The bill passed the Senate without debate on this provision.[21]

The significance of the legislative history set forth above is emphasized by consideration of the following facts. The 1951 amendment of Section 207 represents the latest Congressional enactment on the subject.[22] The Boards for Correction of Military Records constitute the top level in the administrative process, reviewing the decisions of all other boards, including the retiring boards. Lastly, the expression of Congressional intent set forth above comes from a subcommittee operating within its proper scope and communicating its decision to and obtaining the concurrence of the full committee, House of Representatives, and the Senate. In these circumstances, petitioner's cry of violation of a Congressional mandate by the Court below is empty indeed.

4. The Statute of Limitations is Not at Issue in the Case at Bar.

Petitioner asserts that the Court of Claims in the decision below has extended the six-year statute of limitations (28 U.S.C. 2501) far beyond its proper reach. Petition, p. 16. This, of course, is to ignore the causes of action pleaded by the respondent in his petition to the court below, and the actual holding of the court.

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[21] 97 Cong. Rec. 12964-66 (1951).

[22] Except for the 1956 recodification, Section 1552, Public Law 1028, 84th Congress, 2d Session.

Respondent's petition was filed June 29, 1954. Petition, 4. Respondent alleged, the Court found, and the petitioner apparently admits, that the denial to him in 1951 of his right to a determination of his case by a Physical Evaluation Board was unlawful. It is settled law that a claim accrues, so as to commence the running of the statute of limitations, 28 U.S.C. 2501, when suit may first be brought upon it, and not before. *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 644 (1918). In the case at bar, respondent's whole effort between the date of his erroneous release to inactive duty in 1946 and his application to the Correction Board in 1954 was devoted to unavailing attempts to bring about a final determination of his right to retirement and retirement pay. Certainly not until he was denied, in 1951,[23] the right to appear before a Physical Evaluation Board, was any such determination made. It was at that time, three years before the filing of his petition to the Court below, that his right to sue first accrued and the statute of limitations began to run again him. Any action brought by him prior to that time necessarily must have been dismissed as premature.

Respondent's petition having been filed well within the statutory period, it is obvious that no issue as to the statute of limitations exists in this case.

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[23] But for the petitioner's mistake of law in 1951, respondent undoubtedly would not have had to wait until 1957 for the retired pay properly due him from 1946. *Cf. Womer* v. *United States*, 114 C. Cls. 415 (1949); *Frame* v. *United States*, 124 C. Cls. 557 (1953), cert. den. 345 U. S. 994 (1953).

CONCLUSION

The fatal weakness in petitioner's argument is that it ignores the law. Under 28 U.S.C. Section 1491, the Court of Claims has jurisdiction over all Federal Statutory pay claims, including those for retired pay. The exercise of that jurisdiction by the Court below is neither new nor novel, and it presents no question of importance worthy of this Court's attention.

Respondent, a Reserve officer who became disabled by reason of an incident of active service in time of war, sought for eight years without success to have a determination made of his right to retirement pay by the administrative boards and officers charged with the duty of adjudicating cases such as his. Once he was denied because of a mistake of law. Later, his application was arbitrarily denied by the Correction Board. In neither instance was respondent provided the fair, impartial and lawful administrative action contemplated by Congress and provided by statute. The Court below had not only the power but the duty to render the decision and grant the relief which the facts and the law required. Its decision was right.

In the premises, the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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APPENDIX I

STATUTES

28 U.S.C. 1491

"§ 1491. Claims against United States generally; * * *

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * * As amended July 28, 1953, c. 253, § 7, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 44(a), (b), 68 Stat. 1241."

Act of April 3, 1939, 53 Stat. 557, 10 U.S.C. Se. 456:

"Provided further, That all officers, warrant officers, and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government, for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army."

Act of August 2, 1946, 60 Stat. 837, Sec. 207:

"The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or to remove an injustice."

Act of October 25, 1951, 65 Stat. 655, 5 U.S.C., Sec. 191a:

"(a) The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and correction so made shall be final and conclusive on all officers of the Government except when procured by means of fraud: Provided, That procedures set up by the Secretaries of the Army, Navy, and Air Force in accordance with this subsection shall be approved by the Secretary of Defense; Provided further, That no corrective action shall be taken under this subsection unless the request therefor be filed by claimant, his heirs at law, or legal representative, within three years after his or their discovery of the alleged error or injustice may be excused by such board of civilian officers or employees of the Departments upon finding by it that it is in the interest of justice to excuse such failure to file within the prescribed time in which event action shall be taken in the same manners as if the request had been filed within the three years as prescribed herein."